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“Can We Sue Our Way to Prosperity?: Litigation’s Effect on America’s Global
Competitiveness.”

Before the Committee on the Judiciary
Subcommittee on the Constitution
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1. INTRODUCTION:

Chairman Franks, Ranking Member Nadler and members of the Committee: Thank you for inviting me to testify today on the connection between civil litigation and prosperity.

By way of introduction, I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure in the School of Law at the University of Texas at Austin. Next year, I will be a Visiting Professor at the Harvard Law School. I have published many articles about civil litigation, and I am part of a research group that has produced a series of empirical studies of medical malpractice litigation in Texas. Most of our med mal studies have appeared in journals that are peer-reviewed. From 2004 to 2010, I was an Associate Reporter on the American Law Institute's project on the Principles of the Law of Aggregate Litigation. In 2009, I received the Robert B. McKay Award from the Tort Trial and Insurance Practice Section of the American Bar Association in recognition of my scholarship on tort litigation and insurance.

Owing to the short notice I received of this hearing, this prepared statement is brief. I will gladly supplement it upon request.

The title of this hearing asks, "Can We Sue Our Way to Prosperity?" The answer is plainly yes. Civil justice systems contribute greatly to the prosperity of the United States. In fact, the strongest proponents of honest and accessible civil justice systems that protect legal rights and enforce legal obligations are not lawyers but institutional economists.

I will first demonstrate the positive connection between lawsuits and prosperity by talking about medical malpractice litigation—in particular, lawsuits against anesthesiologists.¹ I will then discuss the more general connection between law and economic growth.

2. MEDICAL ERRORS MAKE AMERICA POORER

Until the mid-1980s, anesthesia was dangerous. It killed or severely injured thousands of patients every year.² Not surprisingly, malpractice lawsuits against anesthesiologists were common and "[malpractice] premiums [for these physicians] were . . . among the very highest—in many areas, [anesthesiologists paid] two to three times the average cost for all physicians. By the early 1980s, anesthesiologists recognized that something drastic had to be done if they were going to be able to continue to be insured."³

¹ Fuller accounts can be found in David A. Hyman and Charles Silver, *Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform*, in *MEDICINE AND SOCIAL JUSTICE*, (Oxford University Press; forthcoming 2011); and David A. Hyman and Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 *Cornell L. Rev.* 893 (2005).

² Studies put the mortality rate between 1 in 852 and 1 in 6,048 administrations in the 1950s and 1960s, and between 1 in 2,000 and 1 in 10,000 in the 1970s and 1980s. See, e.g., Alexander Goldstein, Jr. & Arthur S. Keats, *The Risk of Anesthesia*, 33 *Anesthesiology* 130, 133 tbl.1 (1970). About half of these anesthesia-related deaths were preventable. See Ellison C. Pierce, Jr., *The Patient's Safety, Anesthesia, Resident & Staff Physician*, 51, 51 (Feb. 1989).

³ Ellison C. Pierce, Jr., *The 34th Rovenstine Lecture: The Establishment of the APSF and the ASA Closed Claims Study*, *The Anesthesia Patient Safety Foundation* (1995), at <http://www.apsf.org/about/rovenstine/>

Facing the situation just described, the leaders of the American Society of Anesthesiologists (ASA) could have asked state legislatures or Congress to protect them from lawsuits. That is what health care providers usually do. When faced with lawsuits, they demand tort reform. The leaders of the ASA decided to protect patients from harm instead. Using closed malpractice claims, they identified the root causes of mistakes. Then they redesigned their equipment, established mandatory treatment guidelines, and took other steps to make accidents less likely and less harmful.⁴ The results were spectacular. In approximately a decade, mortality rates fell to 1 in every 200,000 anesthesia administrations—a ten- to twenty-fold improvement in patients' survival odds.⁵

As anesthesia became safer, both the frequency of malpractice lawsuits and the cost of resolving claims sharply declined.⁶ The fraction of total medical malpractice insurance costs attributable to anesthesia-related claims fell from 11% to 3.6% over fifteen years.⁷ Because costs fell, malpractice insurance became more affordable. In real dollars, anesthesiologists pay less for liability coverage today than they did in 1985.⁸

A 2005 Wall Street Journal article summarized these developments:

Today, anesthesia-related adverse events and emergencies are rare, and anesthesiologists' malpractice insurance premiums are low. Anesthesiologists pay less for malpractice insurance today, in constant dollars, than they did 20 years ago. That's mainly because some anesthesiologists chose a path many doctors in other specialties did not. Rather than pushing for laws that would protect them against patient lawsuits, these anesthesiologists focused on improving patient safety. Their theory: Less harm to patients would mean fewer lawsuits.⁹

No one denies that lawsuits spurred this remarkable accomplishment. The leaders of the ASA have stated candidly and repeatedly that they acted when they did because insurance rates for

⁴ Girish P. Joshi, 10 Things that Changed Anesthesiology (2005), available at <http://www.asahq.org/Newsletters/2005/Centennial/joshi100.html#joshi>.

⁵ Lucian L. Leape, Error in Medicine, in *Margin of Error: The Ethics of Mistakes in the Practice of Medicine* 95, 107 (Susan B. Rubin & Laurie Zoloth eds., 2000); Ellison C. Pierce, Jr., Anesthesia: Standards of Care and Liability, 262 *Journal of the American Medical Association* 773, 773 (1989).

⁶ On claims, see Ellison C. Pierce, Jr., ASA Monitoring Guidelines: Their Origin and Development, 66 *American Society Anesthesiologists Newsletter*, Sept. 2002, at 22, 23, available at www.asahq.org/Newsletters/2002/9_02/feature7.htm.

⁷ Ellison C. Pierce, Jr., Anesthesia: Standards of Care and Liability, 262 *Journal of the American Medical Association* 773, 773 (1989).

⁸ K.B. Domino, Malpractice Insurance Premiums: Greater Stability for Most Anesthesiologists, 70 *ASA Newsletter* 6 (2006); Karen B. Domino, Increasing Costs of Professional Liability Insurance, 67 *American Society Anesthesiologists Newsletter*, June 2003, at 6; Paul R. McGinn, Practice Standards Leading to Premium Reductions, *American Medical News*, Dec. 2, 1988, at 1, 28; Medical Malpractice Rates Drop for Anesthesiologists, *Las Vegas Sun*, May 14, 2003, at B2.

⁹ Joseph T. Hallinan, One group of doctors changes its ways, *Wall Street Journal*, June 21, 2005.

anesthesiologists had spiked. The anesthesia patient safety campaign was set in motion because “a malpractice crisis [] was markedly reducing the incomes of anesthesiologists.”¹⁰

One connection between the improvement in anesthesia safety and the prosperity of the United States is obvious. People who are alive contribute more to our prosperity than people who are dead, and healthy people contribute more than injured people. Because anesthesia safety improved, hundreds of thousands of Americans who would otherwise have died or suffered incapacitating brain damage emerged from surgery alive and well. These people returned to their families and their jobs and continued to contribute to America’s prosperity.

A second connection is less obvious. Because anesthesia safety improved, anesthesiologists can now treat frail patients they would previously have turned away. These patients, who once would have died or remained crippled, can now have life-saving or life-improving surgeries that enable them to contribute too. Millions of Americans are better off today because decades ago, patients who were injured by anesthesia-related errors filed lawsuits.

Finally, it is worth noting that the lawsuit-inspired improvement in anesthesia safety has saved countless health care dollars. Patients who were injured by anesthesia mistakes often required expensive follow up care. Some victims needed round-the-clock care for the rest of their lives. Because anesthesia is safer, dollars that would once have been spent caring for malpractice victims now pay for other treatments.

I urge the members of this Subcommittee to ask why other health care providers should be allowed to follow any path other than the one taken by the ASA. Instead of improving their delivery systems and protecting patients from harm, interest groups representing other health care providers demand tort reforms. And they usually get them. Many states have restricted lawsuits in ways that insulate providers from responsibility for the consequences of their mistakes. Not surprisingly, anesthesia delivery is the only component of the health care system that meets industrial quality standards. All other segments have serious quality problems. In April 2011 the peer-reviewed journal *Health Affairs* published a series of articles by public health researchers that document these shortcomings:

- 33.2% of patients treated at three leading hospitals experienced adverse events, including medication errors, procedural errors, hospital-acquired infections, pulmonary venous thromboembolisms, pressure ulcers, device failures and patient falls.¹¹
- Adverse medical events—medical interventions that cause harm or injury to a patient separate from the underlying medical condition—may cause 187,000 deaths in hospitals each year and 6.1 million injuries, both in and out of hospitals. The annual social cost of

¹⁰ Jeffrey B. Cooper, *Getting into Patient Safety: A Personal Story* (2006), available at <http://www.webmm.ahrq.gov/perspective.aspx?perspectiveID=29>.

¹¹ David C. Classen et al., ‘Global Trigger Tool’ Shows That Adverse Events In Hospitals May Be Ten Times Greater Than Previously Measured, 30 *Health Affairs* 581 (2011).

these adverse medical events, based on the amounts people pay to avoid such risks in non-health care settings, ranges from \$393 billion to \$958 billion.¹²

- Medical errors resulting in injuries to patients generate \$17.1 billion in additional health care costs each year. So-called “never events,” more than 400,000 of which occurred in the United States in 2008, accounted for \$3.7 billion of this amount.¹³

Plainly, medical errors imperil America’s prosperity.

Health care providers can do better. In fact, almost every time they try to do better, they succeed. In one recent pilot program, Michigan hospitals reduced the rate of central line infections to zero. In another, obstetricians at the New York Presbyterian Hospital-Weill Cornell Medical Center reduced the frequency of unexpected occurrences involving death or serious injury to infants from 1.04 per 1000 deliveries in 2000 to 0 in 2008 and 2009. No maternal deaths during labor and delivery occurred at the hospital for 6 years. Medical errors persist simply because providers take the steps that would prevent them less often than they should. Several reasons account for this, but an important one is that elected officials have insulated health care providers from the cost of medical errors by imposing tort reforms.

3. CIVIL JUSTICE SYSTEMS HELP COUNTRIES PROSPER

A large literature exists on the connection between law and economic prosperity. Economists have done most of this research, but political scientists and law professors have contributed too. I know only part of this literature, but because it strongly affirms the connection between common law adjudication and economic growth, I believe the members of this Subcommittee should be aware of it and I attempt to summarize it briefly.

A. It is impossible to have a developed economy without a functioning system of enforceable legal rights

Douglass North, the Nobel Prize winning economist, observed that “[t]he creation of a system of enforceable property rights is one of the most important institutional prerequisites to economic growth.”¹⁴ The truth of this proposition is self-evident. Countries with weak legal regimes tend to be less developed economically than countries that with strong ones. Often, the difference is striking. Table 1 lists the ten countries with the lowest and highest “rule of law” rankings by Freedom House, along with their per capita GDPs. The tendency of countries with high rankings to be wealthier than countries with low rankings is evident.

¹² John C. Goodman, Pamela Villarreal and Biff Jones, The Social Cost Of Adverse Medical Events, And What We Can Do About It, 30 Health Affairs 590 (2011).

¹³ Jill Van Den Bos, et al., The \$17.1 Billion Problem: The Annual Cost Of Measurable Medical Errors, 30 Health Affairs 596 (2011).

¹⁴ Douglass Cecil North, Structure and Change in Economic History (1981).

Table 1: Top Ten and Bottom Ten Countries by Rule of Law Rank, Personal Autonomy Rank, and GDP Per Capita, 2007				
	Country	Rule of Law	Personal Autonomy & Individual Rights	GDP Per Capita
Bottom Ten	Burma	0	4	\$1,800
	Congo (Kinshasa)	0	1	\$1,400
	Iraq	0	4	\$1,900
	Libya	0	6	\$12,300
	North Korea	0	1	\$1,800
	Somalia	0	0	\$600
	Sudan	0	0	\$2,400
	Turkmenistan	0	0	\$8,500
	Uzbekistan	0	2	\$2,000
	Chad	1	3	\$1,500
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Top Ten	Uruguay	15	15	\$10,900
	Barbados	16	15	\$18,400
	Finland	16	16	\$33,500
	Iceland	16	16	\$38,000
	Liechtenstein	16	16	\$25,000
	Luxembourg	16	16	\$71,400
	Malta	16	15	\$21,300
	Norway	16	16	\$46,300
	San Marino	16	16	\$34,100
	Sweden	16	16	\$32,200
Sources: Freedom House, Rule of Law and Personal Autonomy, Freedom in the World 2007 Subscores, http://www.freedomhouse.org/template.cfm?page=372 ; CIA World Factbook 2009, GDP - per capita (PPP) 2007 Country Ranks.				

In the statement by Douglass North I quoted, the word “enforceable” should not be missed. For legal rights of any sort to do their job, rights-holders must be able to demand that rights be honored or respected. Courts are the institutions that enforce legal rights. Consequently, successful legal regimes give rights-holders access to courts.

B. Enforceable legal rights facilitate economic growth by rendering persons and their expectations secure against external threats.

Although North wrote of “property rights,” property is an exceptionally broad category. It includes not only land, but contractual rights to payment, inventions, trademarks, bank accounts, securities, and many other things to which people assign significant value. Moreover, when it comes to understanding the contribution the rule of law makes to economic growth, the distinction between property rights and other rights or liberties is not important. As the economist David Scully observed, “[I]f life, liberty, and property are not additively separable attributes; the diminution of one diminishes all.”¹⁵ The rule of law facilitates economic growth by enhancing personal security from external threats and by enabling people to enjoy the returns on their productive activities and investments. Studying 115 countries from 1960 to 1980, Scully found that:

On average, politically open societies grew at a compound real per capita rate of 2.53 percent per annum compared to a 1.41 percent growth rate for politically closed societies. On average, societies that subscribe to the rule of law grew at a 2.75 percent rate compared to a 1.23 percent rate for societies in which state rights take precedence over individual rights. On average, societies that subscribe to private property rights and a market allocation of resources grew at a 2.76 percent rate compared to a 1.10 percent rate in nations in which private property rights are circumscribed and the state intervenes in resource allocation.¹⁶

A study published in the *Journal of Institutional Economics* in 2010 argues that civil liberties better measure the rule of law than economic liberties, for the purpose of understanding the connection between law and economic growth.¹⁷

C. Economies tied to common law legal systems tend to develop more rapidly than economies tied to civil law systems, because common law courts decentralize power and provide superior protection against legislative and executive interference with individual rights and liberties.

Finally, among countries committed to the rule of law with strong civil liberties, there is evidence that economic growth occurs more quickly in those with common law legal systems than in those with civil law systems. Friedrich Hayek, the Austrian economist and noted defender of liberty, suggested that this might be so when he observed that “[t]he ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated.”¹⁸ Given the connection between liberty and economic growth,

¹⁵ Gerald W. Scully, The Institutional Framework and Economic Development, 96 *Journal of Political Economy* 652 (1988).

¹⁶ *Id.*, 657-658.

¹⁷ Ariel Benyishay and Roger Betancourt, Civil liberties and economic development, 6 *Journal of Institutional Economics* 281 (2010).

¹⁸ Friedrich A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* 94 (1973).

faster growth might be expected in common law countries with stronger protections for individual rights. Paul Mahoney, the Dean of the law school at the University of Virginia, published a study in 2001 finding that common law countries do indeed grow more quickly. He attributed the result to the independence of common law courts and the greater ability of common law judges to check over-reaching actions by executives and legislatures.¹⁹

Of course, the common law protects the freedom and security of individuals in many ways. It enforces property rights and contracts, and it gives everyone the right to live out his or her life free of harms inflicted unreasonably by others. The right to have others exercise reasonable care when acting in potentially dangerous ways is the fundamental principle of tort law, which is as much a part of the common law tradition as the law of property and contract. Legislation that renders tort law impotent, by watering down substantive legal standards, by imposing procedures that make lawsuits impracticable, or by undermining the independence of common law courts, threatens personal security. Such legislation may therefore be predicted to endanger prosperity too. It is difficult to test this proposition empirically, for many reasons, but the lesson of history and comparative economics appears to be that prosperity is more likely to occur when courts stand as bulwarks against executive and legislative excesses than when courts are subservient to them.

¹⁹ Paul G. Mahoney, The Common Law and Economic Growth: Hayek Might Be Right, 30 *Journal of Legal Studies* 503 (2001).